No. 15269

In the United States Court of Appeals for the Ninth Circuit

UNITED STATES OF AMERICA, APPELLANT

v.

F. C. HATHAWAY, APPELLEE

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF OREGON

BRIEF FOR THE UNITED STATES OF AMERICA

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INDEX

CITATIONS

Cases:

Miscellaneous:

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JURISDICTIONAL STATEMENT

The United States entered into a contract with the plaintiff F. C. Hathaway for the sale to the plaintiff of certain steel lock gates located at the old Government locks, Cascade Locks, Oregon. This action was brought to recover damages in the amount of $10,000 for the alleged breach of the contract by the Government and to have the contract reformed by reducing the purchase price of the steel locks in question (R. 3–5)[1]. The United States denied that it had committed a breach of contract, denied that the plaintiff was entitled to reformation of the contract price, and by way of counterclaim sought judgment against the plaintiff for the unpaid balance due on the contract (R. 5–10).

[1] "(R. —)" references are to the printed transcript of record.

The district court found that while both of the parties contemplated that all of the steel which was the subject of the contract could be removed, only one-half of that amount was practicably possible of removal, and therefore the plaintiff was entitled to have the purchase price reduced by one-half and the Government was not entitled to recover on its counterclaim (R. 27–29). No specific finding was made with respect to the breach of contract issue, and since the court's judgment was entered after "being fully advised" (R. 27), presumably plaintiff's claim in this regard was rejected.[2] The United States filed a notice of appeal on June 14, 1956, from the judgment entered in favor of the plaintiff (R. 30), and the plaintiff has not appealed from the failure of the district court to award him damages for breach of contract.

The jurisdiction of the district court over the plaintiff's claim and the Government's counterclaim rests on 28 U. S. C. 1346 (R. 11). This court's jurisdiction is invoked under 28 U. S. C. 1291.

STATEMENT OF THE CASE

The contract in question was entered into on March 20, 1952. The steel lock gates which were the subject of the contract were located below the level of the waters of the lake formed by Bonneville Dam, having been largely submerged at the time of the raising of the Bonneville pool. The decision was made to place

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[2] In an earlier memorandum the district court had found that plaintiff's claim for damages was speculative, and it is possible that the court considered this memorandum to be dispositive of the issue (R. 26).

these gates on the scrap steel market because of the acute shortage of such steel which existed in 1952, and accordingly the U. S. Army Corps of Engineers invited bids for the purchase of the entire lot, which was stated on the bid invitation as comprising approximately 985.3 gross tons. Plaintiff's high bid of $7500 was accepted by the Contracting Officer. In accordance with the terms of the invitation, plaintiff paid a bid deposit of $1500, with the balance of the purchase price required to be paid prior to December 1, 1952, or prior to the removal of any property (R. 8).

The general sales terms and conditions of the contract, which all bids were made subject to, provided (R. 60–61):

> 1. *Inspection.*—Bidders are invited and urged to inspect the property to be sold prior to submitting bids. Property will be available for inspection at the places and times specified in the Invitation. The Government will not be obliged to furnish any labor for such purpose. In no case will failure to inspect constitute grounds for a claim or for the withdrawal of a bid after opening.

The encouragement of bidders to inspect the property was especially important because, as with the sale of much government surplus property, the lock gates were sold on an "as is, where is" basis (R. 61):

> 2. *Conditions of Property.*—All property listed herein is offered for sale "as is" and "where is," and without recourse against the Government. * * * The description is based on the best available information, but the Government makes no guaranty, warranty, or rep-

> resentation, expressed or implied, as to quantity, kind, character, quality, weight, size, or description of any of the property, or its fitness for any use or purpose, and no claim will be considered for allowance or adjustment or for rescission of the sale based upon failure of the property to correspond with the standard expected; this is not a sale by sample.

In addition, the general terms of the sale required that the full purchase price be paid "prior to the date specified for removal and prior to delivery of any property." (R. 61.) Title to the property would vest in the purchaser only upon full and final payment, and the purchaser would thereupon be entitled to remove the property, but at his own expense (R. 62). The contract made specific provision for the consequence of the purchaser's failure to meet his obligations with respect to payment and removal of the property: "If the successful bidder fails to make full and final payment as herein provided, the Government reserves the right, upon written notice to the successful bidder, to sell or otherwise dispose of any or all of such property in the Government's possession and to charge the loss, if any, to the account of the defaulting bidder." (R. 62.) And if the purchaser failed to remove the property from government premises by the specified time, the Government would be entitled to collect storage charges and had the right, after proper notice, to resell the property and apply the proceeds against those charges (R. 63).

Aside from these general terms and conditions, all bids were also made subject to certain special condi-

tions of this particular contract. It was reemphasized that the property was being sold "as is, where is" (R. 64). A chart was attached to the bid invitation prepared from a recent hydrographic survey of the old locks showing the approximate height of the water, approximate positions of various gates, and the silting condition at the bottom of the locks (R. 64–65). Bidders were also invited to examine a print showing the design of the gates and the manner in which they were secured to the lock walls (R. 64).

Despite the various provisions in the bid invitation which indicated that an inspection of the property should be made before a bid was submitted, and despite the direct urging of the plaintiff by at least one employee of the Corps of Engineers in this regard (R. 44), the plaintiff failed to make an inspection prior to submitting his bid (R. 32–33, 35, 44). This was true even though the plaintiff admittedly lacked experience in this type of a salvaging operation (R. 32–35). After the bid was made and accepted, he inspected the job site with other persons with whom he had made tentative arrangements to assist in the financing of his operation,[3] but these persons after examining the site and apparently concluding that the removal would be very difficult, declined to give

[3] The employee of the Corps of Engineers responsible for this contract testified that when plaintiff made this inspection, his attention was called to the substantial spread between his bid and the other bids; despite this, plaintiff indicated that he felt he would come out all right on this particular offer from his experience in logging and salvage operations (R. 44–45; Tr. 162–163). Mr. Hathaway did not deny this, but claimed that he did not recall the conversation (R. 36–37).

the plaintiff the financial backing he needed and expected (R. 37–39).[4]

The plaintiff proceeded with the work with the equipment he had available in the fall and winter of 1952. Before the end of the year, the divers whom he had employed were called away to work on another job and plaintiff's operations came to a halt (R. 47). When the divers returned, the water was too high for the operation to continue until after the passage of the high water in September 1953 (*ibid.*). Although the contract required that the property be removed and paid for prior to December 1, 1952

[4] Because of the fact that the plaintiff was underfinanced, he was able to persuade the Contracting Officer that it was impossible for him to pay the balance of the purchase price until he had received payment for the salvaged steel. Accordingly, on October 31, 1952, the Contracting Officer purported to modify the payment terms of the contract by permitting removal of the salvaged property from the government premises directly to the plaintiff's points of sale in Portland, Oregon, subject to the Government obtaining the full amount received for each load until full payment had been made. Plaintiff contended that the Government's failure to recognize the effectiveness of this modification and to allow him to remove the steel in accordance with it resulted in a loss of profits for which he sought damages (R. 13–14). The Government contended that the modification was ineffective because it was outside the scope of the Contracting Officer's authority and because it was made without consideration (R. 14–15). In addition, the Government denied that it had prevented the plaintiff from removing the salvaged steel and denied that he could have sold the steel for the prices he claimed, but alleged that plaintiff's loss, caused by a steady drop in the market price of steel, was due to his own delay in proceeding under the contract (R. 17). As stated, *supra* p. 2, the district court made no findings on this issue, and since plaintiff has not brought an appeal on this portion of the case, no further discussion of it will be made.

(R. 12), the Government acquiesced in this delay in performance. In the fall of 1953, plaintiff removed from the water a part of the property to be salvaged under the contract, of the approximate weight of 517 tons, which he placed on the banks of the old lock canal (R. 28). This consisted of the lock gates at the upper end of the canal, but when the diver examined the gates at the lower end, he found that because of the depth, the silt and other debris, and the fact that one lock was sprung, the removal of any more steel would be economically unfeasible and too hazardous for diving operations (R. 48–50). Accordingly, plaintiffs salvaging operations were discontinued.

The Corps of Engineers then extended the time for payment of the purchase price and removal of the steel from the canal banks until January 4, 1954, at which time plaintiff's rights would be terminated if he had failed to comply with his contractual obligations (R. 14, 15). No further payments having been received by that time, the Government on February 3, 1954, issued invitations to bid on the 517 tons of steel lying on the canal banks and subsequently sold the steel for the sum of $4,387.98, which amount was credited to plaintiff's account (R. 12–13). Thereafter, this suit was instituted seeking damages for the alleged breach of the modification agreement by the Government and seeking a reduction in the purchase price of the contract by one-half (R. 3–5).

The district court found that "the parties were mutually and equally mistaken as to the amount of

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steel which it was practicably possible to remove from the old Cascade Locks" and that "the parties each understood that all of such steel could be removed, and neither intended that the contract would include steel which could not be so removed" (R. 28–29). Accordingly, the court concluded that the purchase price should be reduced by one-half, or $3,750 (R. 29). Since the plaintiff had paid $1,500 as a bid deposit and his account had been credited with the $4,387.98 proceeds of the government sale, judgment was entered in favor of the plaintiff for $2,137.98 and the Government took nothing by its counterclaim (*ibid*).

SPECIFICATION OF ERRORS

The district court erred:

(1) In failing to find that plaintiff in purchasing the lock gates on an "as is—where is" basis, bore the entire risk incident to removability of the property.

(2) In failing to find that the best information in regard to the lock gates available to the defendant was passed on to the plaintiff, and that such information was substantially accurate, and that defendant made no representations or warranties, express or implied, or in any way mislead or misinformed plaintiff as to the difficulty of removal of the property.

(3) In failing to give effect to paragraph 1 of the General Conditions of the contract which invited and urged bidders to inspect the property offered and provided that "in no case will failure to inspect constitute grounds for a claim * * *."

(4) In finding that the parties were mutually and equally mistaken as to the amount of steel which it

was practicably possible to remove from the old Cascade Locks.

(5) In finding that both parties understood that all of such steel could be removed and that neither intended that the contract would include steel which could not be removed.

(6) In holding that the purchase price of the contract should be reduced by one-half.

(7) In granting judgment for the plaintiff.

(8) In failing to grant judgment for the defendant on its counterclaim.

SUMMARY OF ARGUMENT

The court below, contrary to the evidence in the record, viewed this case as one of mutual mistake of the parties with respect to the amount of steel which could be removed from the old Cascade Locks, justifying a reduction by one-half of the purchase price of the contract. In so holding, the court failed to give effect to various provisions of the contract which make it clear that this was not a case of mistake since the Government intentionally, and with clear notice to the plaintiff, entertained no views with respect to the question as to which the parties were found to be mutually mistaken. The property was sold on an "as is, where is" basis and without recourse against the Government. Bidders were invited and urged to inspect the property prior to submitting bids and were advised that a failure to inspect would not constitute grounds for a claim. Furthermore, the Government expressly disclaimed warranties or guaranties of any kind in the clearest language possible. The plaintiff

knew, or should have known, of all of these terms and conditions since they were contained in the Invitation to Bid to which he responded. In these circumstances, a claim of mutual mistake could not be sustained, at least not without evidence outside of the written instrument establishing that the parties in fact contemplated a situation different from that which was subsequently found to exist. No such evidence was introduced or offered. To the contrary, the evidence shows that not only did plaintiff's potential financial backers decline to go through with the transaction when his visit to the site disclosed the difficulties of removal, but plaintiff insisted he would come out all right after the spread between his bid and the other bids was disclosed to him. At best, plaintiff has presented a case where the expectation of one party to a contract was not fulfilled and he therefore seeks relief from the other party which will compensate him for his disappointment. In granting that relief, the district court not only was at variance with usual principles of contract law, but departed from a long line of authorities interpreting the standard form contract involved in this case and holding that a purchaser can have no redress against the Government because a risk which he assumed did in fact materialize. Furthermore, we believe that the judgment of the district court is at variance with the principles of the decision of this court in *Triple "A" Machine Shop.* v. *United States,* 235 F. 2d 626.

In any event, the relief awarded to the plaintiff in reducing the price by one-half was speculative and not based on evidence in the record since the court

failed to take into account the fact that more than one-half of the steel was removed by the plaintiff and the cost of salvaging the remaining portion would have been considerably greater than the expense actually incurred.

ARGUMENT

I

Under the provisions of the contract the plaintiff bore the entire risk incident to removability of the property, and his mistaken contemplation in this regard does not constitute a ground for affording him relief

A. The terms of the written contract of sale disclaimed any view on the part of the Government with respect to removability or accessibility of the property, but placed this risk on the purchaser.

We believe that the plain meaning of the terms and conditions of this sale, which the plaintiff was aware his bid was made subject to, makes it clear that the parties intended that the purchaser was assuming the entire risk with respect to how much steel was capable of being removed. The property was sold on an "as is, where is" basis. This phrase was used both in the general terms and in the special conditions of this contract (R. 61, 64). Also, the sale was made "without recourse against the Government" (R. 61). While the description of the goods was declared to be based on the best available information, the Government made "no guaranty, warranty, or representation, express or implied, as to quantity, kind, character, quality, weight, size, or description of any of the property * * *" (*ibid*). In addition, the bidders were "invited and urged to inspect the property to be sold prior to submitting bids" and all bidders were advised that "in no case will failure to

inspect constitute grounds for a claim * * *'' (R. 60–61).

The only possible basis for concluding that the Government, as well as the plaintiff, intended that the contract would include only that steel which could be removed and that both understood that all of the steel was capable of removal when they agreed upon this purchase price, is that the invitation to bid contained a description of the property as comprising approximately 985.3 gross tons of steel. But we submit that it would be difficult to formulate any language which would indicate more clearly than the terms of this sale did that the Government did not intend to be bound by the description of the property given, but that the description was only intended as a general indication of the property being sold. It would be difficult to devise language which would more clearly put prospective buyers on notice that it was their duty to inspect the property, that what they were purchasing was a "cat in a bag," and that the risk that the cat would not turn out as well as they expected would have to be borne by them and therefore should be reflected in the amount of the bids which they submitted. Any reliance on the description contained in the contract was at the purchaser's own risk. And, indeed, there is no evidence to indicate that the description given, *i. e.,* that the steel lock gates contained approximately 985.3 gross tons of steel, was not entirely accurate. The Government has always stood ready to pass title to the full amount of the property described in the bid invitation upon full payment of the contract price in fulfillment of the contract terms

(R. 19). If the plaintiff is unable to effect the removal of this property, he should not be permitted now, in the light of the conditions of the sale to which he agreed, to shift the loss which he incurred as the result of his own gamble on to the Government. In reality, that is what the plaintiff seeks by this law suit.

The view of the Government in this regard is buttressed by a consideration of the special conditions of this particular bid invitation. Attached to the invitation was a print covering a hydrographic survey of the locks which showed the approximate height of the water, the approximate positions of various gates, and the silting condition at the bottom of the locks (R. 64–65). The diver employed by the plaintiff on this operation testified that this hydrographic chart was substantially accurate and that the amount of silting was not unusual (R. 50, 51, 60). He further testified that if he had been asked by the plaintiff to make a survey and if he found conditions to be as reflected in the Government's chart and as he actually did find them, he would have advised the plaintiff that it was not practical to remove the lower gates (R. 54–55). The evidence was uncontroverted that the plaintiff did not make such an investigation nor indeed did he make any inspection of the property prior to submitting his bid (R. 32–33, 44, 55). On the other hand, it was, we believe, apparent, and there is no evidence in the record to indicate the contrary, that by the hydrographic chart, by the print showing the design of the gates and the manner they were secured to the lock walls, and by the approximate description given of the amount of steel contained in the lock gates, the

Government was passing on to the plaintiff the best and most complete information which was available to it in regard to the difficulties to be expected in salvaging the property sold.

The evidence established that this information was substantially accurate, and there is no evidence to indicate that the Government made any representations or warranties or in any way misled or misinformed the plaintiff as to the difficulty of removal of the property. Indeed, the Corps of Engineers apparently was bothered by the amount plaintiff had bid; not only was a specific suggestion that plaintiff inspect the job made to him but he was shown the wide spread between his bid and the others. Plaintiff, however, declined this opportunity to withdraw and instead reaffirmed that he would come out all right on his offer from his experience in logging and salvage operations. See *supra,* p. 5, fn. 3. Thus, plaintiff was given all the help possible, but despite that, he failed to make a proper inspection and insisted that notwithstanding this critical omission, he still wished to go ahead on the job. By failing to make a proper inspection and to obtain the expert advice necessary in view of his inexperience in this type of operation (R. 32, 34)[5] he knowingly assumed the risk that all of the steel could be removed and that his salvaging operations would be

[5] Had plaintiff not been so eager to go ahead, his optimism would have been tempered substantially by the fact that the people whom he had counted on to finance the job backed out once they visited the site and apparently became aware of the difficulties presented.

as successful as he expected. His gamble was partially lost, and now that the risk he assumed has materialized, he hardly is in a position to complain and request the Government to bail him out of his contract for he had been advised that "in no case will failure to inspect constitute grounds for a claim * * *" and that the sale was made "without recourse against the Government" (R. 60, 61).

The standard provisions contained in this "as is, where is" contract have been considered many times by the courts. Such contracts are often used by the Government in disposing of its vast quantities of surplus property because, although they ordinarily bring lower prices than sales with the usual warranties and guaranties, they save the Government the time and expense of inspecting the property and provide sensible safeguards against exposure to unknown liabilities. We believe it is settled beyond dispute that the buyer in such a sale can make no claim based upon the failure of the transaction to live up to his expectations. *Maguire & Co.* v. *United States,* 273 U. S. 67; *Lipshitz & Cohen* v. *United States,* 269 U. S. 90; *Mottram* v. *United States,* 271 U. S. 15; *United States* v. *Silverton,* 200 F. 2d 824 (C. A. 1); *American Elastics Co.* v. *United States,* 187 F. 2d 109 (C. A. 2), certiorari denied, 342 U. S. 829; *Samuel Furman* v. *United States,* 140 F. Supp. 781 (C. Cls.), certiorari denied, 352 U. S. 847; *Sachs Mercantile Co.* v. *United States,* 78 C. Cls. 801; *General Textile Corp.* v. *United States,* 76 C. Cls. 442; *Yankee Export & Trading Co.* v. *United States,* 72 C. Cls. 258; *Silberstein & Son* v. *United States,* 69 C. Cls. 412; *Snyder Corp.* v. *United*

States, 68 C. Cls. 667; *Shapiro & Co.* v. *United States,* 66 C. Cls. 424; *Triad Corp.* v. *United States,* 63 C. Cls. 151. There can be no question about the propriety of these provisions and their binding effect. While the maxim of *caveat emptor* may no longer be an implied premise of contracts of sale, here it was made one of the specific provisions of the contract. As recently stated by the Court of Appeals for the First Circuit, "under the terms of the sale, with inspection invited prior to the submission of bids, *caveat emptor* was certainly intended to be applied to the furthest limit that contract stipulations could accomplish it." *United States* v. *Silverton, supra,* at 827.

In *Lipshitz & Cohen* v. *United States, supra,* the Supreme Court had occasion to consider the rights of a buyer under an "as is, where is" sale, and especially how his rights are affected by the inclusion of a quantitative estimate in the Government's description of the property. In that case an agent of the United States listed junk for sale at several forts, setting forth that the weights shown were approximate and must be accepted as correct by the bidders. The plaintiffs, without inspection, bid a lump sum for the material "as is, where is." Although the quantities turned out to be much less than those shown on the list, it was held that the plaintiffs could not recover since the Government intended to sell the entire lot as such, and not any specific amount. "The naming of quantities cannot be regarded as in the nature of a warranty, but merely as an estimate of the probable amounts in reference to which good faith only could be required of the party making it." 269 U. S. at 92.

In the instant case, there is even less reason to hold the Government to the quantitative estimate contained in its invitation to bid, for, as we have shown, *supra,* p. 12, it is conceded that the estimate was substantially accurate as to the amount of steel contained in the lock gates, and there is nothing whatever in the bid invitation to indicate that the Government was making any representations with regard to removability. To the contrary, the terms of the sale made it clear that this was a risk assumed by the purchaser which he must evaluate for himself after making a proper inspection. In the *Lipshitz* case, the absence of a warranty was inferred from the fact that the goods were sold "as is, where is"; here, the negation of a warranty was made express (R. 61).

Similarly, in *Maguire & Co.* v. *United States, supra,* the Supreme Court again rejected the claim of a buyer who was disappointed that the property he purchased did not live up to his expectations which were based on the Government's description rather than on his own inspection. The court quoted with approval from the opinion of the Court of Claims (273 U. S. at 68–69):

> Neither the plaintiff, nor its agent, inspected the material before bidding or before consummating the sale. Inspection was invited by the Government and it was expressly stated that no bids would be received subject to inspection after bidding. * * * Purchasers were told, in effect, that if they bought something other than they thought they were buying they could not afterwards assert a claim upon the ground that they were mistaken in the character and quality

> of the materials. * * * If the plaintiff received from the Government a different material from that which it thought it had bought it is not the fault of the Government, and the plaintiff cannot recover for its own negligence.

In *American Elastics Co.* v. *United States, supra,* the plaintiff sued to rescind a contract for the sale of elastic webbing material and to recover the purchase price which he had paid, on the ground of mutual mistake since the material delivered did not correspond to the samples submitted to the buyers. The relief sought was thus substantially the same as plaintiff seeks here.[6] The Court of Appeals for the Second Circuit rejected the buyer's claim of breach of warranty and denied him rescission of the contract. "Nor does the soiled condition of the elastic webbing offer grounds for rescission for mutual mistake as to a material fact, for by the 'as is' terms of the contract the parties agreed that the condition of the goods was to be immaterial." 187 F. 2d 112. That was precisely

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[6] While in his complaint the plaintiff demanded that the contract be "reformed" by reducing the contract price one-half (R. 4–5), it is clear that this is not a proper case for reformation, but that the plaintiff is in reality seeking partial rescission of the contract. Reformation of a written instrument will be decreed only when the words it contains do not correctly express the meaning that the parties agreed upon. It is not a proper remedy for enforcement of terms to which one of the parties never assented, but is only used to make a mistaken writing conform to an antecedent expression of agreement. See 3 Corbin, *Contracts* § 614 (1951 ed.). Here, there is no claim that the written instrument did not accurately express the actual understanding of the parties; rather the contention is that a purchase price of $7500 would not have been agreed upon had the parties not been mutually mistaken with regard to removability of the property.

the contention made by the Government in this case before the district court (R. 16–17, 23), and we respectfully submit that this unbroken line of authorities makes it clear that the district court was in error in rejecting that contention.

The Court of Claims, the court which has been called upon most frequently to deal with this problem, long ago summarized the applicable principles in the landmark case of *Triad Corp.* v. *United States,* 63 C. Cls. 151, 156:

> Under the terms of the catalogue it is difficult to perceive how the Government could have given purchasers more specific warning than it did, that they bought at their risk what material it had and was offering for sale; that if a purchaser wished to protect himself he could do so by inspection, full opportunities for which were offered, and that if he failed to inspect and received something other than what he thought he was buying he could have no redress and could not claim allowances by reason thereof. More than that, he was distinctly told that failure to inspect would not be considered as ground for adjustment. If plaintiff neglected to embrace the opportunity offered it to inspect and purchased the property without doing so, with notice that it bought at its own risk, it created by its own negligence the situation from which it now seeks relief.

B. There is no evidence in the record to support the district court's finding that the parties were mutually mistaken as to the amount of steel which could be removed

We believe we have demonstrated that since the terms of the written contract of sale placed on the

purchaser the complete risk with respect to removability of the property, the question of whether the contract price should be reduced because of the mutual mistake of the parties was not an issue in this case. Certainly, there is nothing in the written terms to indicate that the Government had any specific understanding or contemplation with respect to removability. We have shown that no representation in this regard can be implied from the fact that the bid invitation contained an approximate estimate of the quantity of steel to be found, and that such a description was nothing more than an indication of what was being sold under the contract. And aside from the written instrument, no evidence was introduced by the plaintiff to support his contention, and the district court's finding, that this was a case of mutual mistake.[7] There is no evidence whatever from which the court could conclude that "the parties each understood that all of such steel could be removed, and neither intended that the contract would include steel which could not be so removed" (R. 28–29). The written contract indicates that the contrary was true, that the parties made this factor immaterial to their agreement, and there is no evidentiary basis to suppose that anything other than the clear meaning of the written agreement was intended. As Professor Corbin has stated with respect to contracts in which the buyer assumes the risk of the nonexistence of the subject matter, "In such cases, there is no mis-

[7] Since no such evidence exists, it is not necessary to deal with the question of whether it would be admissible under the parol evidence rule.

take; instead, there is a conscious ignorance." 3 Corbin, *Contracts,* § 600 (1951 ed.). That is precisely the situation here. At most, this is a case where a buyer's expectations were not completely fulfilled, but his disappointment, or, indeed, his having made a bad bargain, does not constitute a legal basis for affording him relief. Had he inspected the property as he was urged to do, his loss might never have materialized. Instead, he plunged into the operation with only the vaguest idea of the problems which would be encountered and now seeks to have the Government bail him out when he is confronted with the realities of the situation. We know of no reason why the Government should be saddled with this burden.

C. The judgment of the district court is not in accord with the recent decision of this court in *Triple "A" Machine Shop* v. *United States*, 235 F. 2d 626.

While the contract involved in the decision of this Court in *Triple "A" Machine Shop* v. *United States,* 235 F. 2d 626, is not of the same type involved in the instant case, we believe that the principles of that decision require a result here different from that reached by the district court. In the *Triple "A"* case, the Government had solicited bids for work and services pursuant to a master contract entered into with several contractors. This master contract did not provide for the work to be performed, but did provide, upon acceptance of a bid, for the performing of work under job orders issued by the contracting officer. The plaintiff in that case successfully bid for work to be performed on certain life boats. The Invitation to Bid advised bidders of the

location of the life boats and their availability for inspection. The specification which accompanied the invitation was made a part of the job order and provided:

> It is the intent of these specifications to provide for the complete repair and reconditioning both mechanically and structurally, of five (5) life boats, all as necessary to place the boats in first class operating condition and ready for use. The work shall include, but shall not be limited to, any detailed specifications which follow.

Subsequently, the Contracting Officer required Triple "A" to furnish certain materials and labor to accomplish the repair and reconditioning of the boats. This included certain items which the evidence showed beyond dispute were impossible to ascertain by inspection until after the boats had been dismantled by the contractor in the performance of the repairs. It was at this stage that the items were required for which Triple "A" sought additional compensation as extra work not included in the contract. This court held that the specification quoted above by itself justified the conclusion that the bid covered all extra material and services necessary to complete the job. 235 F. 2d at 629. This was so because the contractor had agreed by submitting a bid to perform whatever work was necessary to put the boats in proper operating condition and not to be limited by the detailed specifications. "The fact they could not see some of the work required, when they made their bid, is not a defense. They took a 'cat in a

bag.' " 235 F. 2d at 631. Similarly, in the instant case, when the plaintiff submitted a bid subject to the condition that the property was sold "as is, where is" and without recourse against the Government, when the Government expressly disclaimed all warranties and representations, and when the bidder was advised that failure to inspect would not constitute grounds for a claim, he, too, took a "cat in a bag," and should not be heard to complain that his expectations were not fulfilled. Indeed, in the case at bar there is even less reason to afford the plaintiff relief, for, unlike the situation in *Triple "A"*, a proper inspection would have revealed the difficulties to be encountered in an attempt to salvage the lower lock gates (R. 54–55). In both cases, the plaintiffs submitted bids subject to conditions under which they assumed the risks of unprovided-for contingencies; in both cases they should not be permitted to shift the burdens of those risks on to the Government. As stated by this court in *Triple "A"*, "Proper pleadings and proper evidence might have presented a case of mutual mistake. But we cannot remake the parties' contract on the pleadings and record made below." 235 F. 2d at 631. Here, too, the record does not justify the conclusion that the parties were mutually mistaken with respect to how much steel could be salvaged, although, unlike *Triple "A"*, the plaintiff did present his case on that theory. And there is nothing in the record to indicate that the contract was not intended to cover exactly what the plain meaning of its terms indicated. In *Triple "A"* the contract by its terms included all work necessary

to put the boats in operating condition; here, the contract by its terms included the sale of the complete set of lock gates without regard to removability. The contrary finding of the district court, unsupported by any evidence, should be set aside and its judgment, based on this erroneous finding, should be reversed.

II

The district court's modification of the contract by dividing the purchase price in half was speculative and not based on the evidence

Having found that the parties were mutually mistaken as to the amount of steel which could be salvaged and that only one-half of the steel was practicably possible of removal (R. 28), the district court reduced the purchase price of the contract by one-half (R. 29). Even assuming that plaintiff is entitled to some relief, which we have urged is not the case, it is apparent from other findings made by the court that this figure of 50% was not arrived at by reference to the undisputed evidence as to the percentage of steel which was removed by the plaintiff and sold for his account. As agreed upon by the parties (R. 12), the court found that the contract was for the sale of approximately 985.3 tons of steel and the plaintiff removed from the water approximately 517 tons (R. 28). We can only conclude that the amount of the judgment entered in plaintiff's favor was speculative since more than 50% of the steel, based on the only estimate available, was salvaged. This is underscored by a further consideration as to which, although no findings were made,

there was evidence in the record. It is apparent from the testimony of the diver employed by the plaintiff that to remove the gates at the lower end of the canal, even if possible of removal, would have involved much greater expense than that incurred with respect to the upper gates which were known to be in shallower water and not as affected by accumulation of debris (R. 46–49, 55–58). Thus, removal of the lower gates would have involved the use of heavier equipment, would have been of greater hazard to the divers, and undoubtedly would have taken greater time. Had the district court considered these factors, as it properly should have, the amount of its award to the plaintiff would have been materially reduced. It is difficult to perceive the basis for the court arriving at the figure which it did other than the fact that such an amount was requested by the plaintiff (R. 5).

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgment of the district court should be reversed and the case remanded to that court with directions to enter judgment for the United States on both the plaintiff's claim and its counterclaim.

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